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No. 102

In the Supreme Court of the United States

October Term, 1901

KARPEL OBERNDORF, LEO, AND THOMAS FLEISHER
COPARTNERS DOING BUSINESS AS
OBERNDORF, FLEISHER & CO.,
APPELLANTS,

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 932

KOPPERS COMPANY, INC., AND THOMAS FLEXIBLE COUPLING COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court which held that appellant Koppers Company, Inc. ("Koppers") violated Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, in acquiring the Thomas Flexible Coupling Company ("Thomas"), and ordered Koppers to dispose of its interest in Thomas.

Following a trial without a jury, the district court made detailed and specific findings of fact which, in-

sofar as pertinent here, may be summarized as follows: At the time of the acquisition of Thomas by Koppers in January 1961, both companies were engaged in the manufacture and sale of flexible couplings, which are used for the general purpose of transmitting power between machines by joining together rotating shafts. Flexible couplings serve three functions: (1) coupling shafts for mechanical power transmission, transferring the torque of one shaft to the other, directly and with constant velocity; (2) compensating for all types of misalignment between shafts without inducing stresses and loads on the connected equipment and without a tangible loss of power; and (3) compensating for end or axial movement of the coupled shafts, preventing either shaft from exerting a thrust on the other and allowing each to rotate on its normal axial position. There are various types of flexible couplings, such as gear, disc, grid, jaw and chain, each of which performs the same aforementioned functions but uses a different method to achieve its flexibility (J.S. 42). Prior to the merger, Koppers manufactured and sold the gear-type flexible coupling only and Thomas the disc-type (J.S. 42).

Koppers is a highly diversified organization with total sales in 1960 in excess of $300 million. It conducts its business through eight operating divisions, one of which is its Metal Products Division. The Metal Products Division is in turn divided into various departments, one of which is the Coupling Department which manufactures and sells flexible couplings from its plant in Baltimore, Maryland.

through sales representatives located in the principal cities of the United States (J.S. 41). Koppers is the largest manufacturer of flexible couplings in the United States. In 1960 its sales of flexible couplings amounted to $6,739,721, which comprised 23% of total industry sales of all types of flexible couplings (J.S. 53).[1]

Prior to its acquisition, Thomas manufactured flexible couplings in its plant in Warren, Pennsylvania, which it sold through representatives located in the principal cities in the United States (J.S. 41). Thomas was the largest firm in the United States manufacturing only flexible couplings and the fourth largest in the industry (J.S. 53). It had sales in 1960 amounting to $1,715,048, which comprised 5.8% of the total industry sales (J.S. 54).

By acquiring Thomas, Koppers increased its already dominant position as the largest manufacturer of flexible couplings. The combined Koppers-Thomas total sales in 1960, the year prior to the acquisition, amounted to $8,454,769, or 28.8% of all sales of flexible couplings in that year (J.S. 54). Total industry sales in 1960 amounted to approximately $29,400,000 (J.S. 43), of which the twenty largest companies accounted for $27,745,000, or 94.5%, and the four largest companies (including Koppers, first, and Thomas, fourth) accounted for 54.6%. Of the 61 companies in the

[1] Koppers' share of the market for flexible couplings has been steadily increasing. In 1958 its sales were approximately $5,700,000, which represented 20.5% of total industry sales. In 1959 Koppers' sales of flexible couplings had increased to over $6,100,000, or 21.6% of total industry sales (Edgs. 13, 74; J.S. 43, 54).

flexible coupling industry in 1960, 44 companies had coupling sales of less than $250,000, while only ten companies had sales in excess of $1 million (J.S. 55).

On these facts the district court held that the "acquisition of the stock of Thomas by Koppers violates Section 7 of the Clayton Act" (J.S. 58). Its holding rested on specific conclusions with respect to (1) line of commerce; (2) section of the country; and (3) competitive effect of the acquisition. The court found that the appropriate line of commerce in which to test the competitive effects of the acquisition was the flexible coupling industry (J.S. 22, 24) and that, as stipulated between the parties, the appropriate "section of the country is the whole United States" (J.S. 24). With regard to the competitive effects, the district court found that: (1) Koppers has increased its percentage of the flexible coupling market from 23% to 28.8%; (2) Thomas has been eliminated as a substantial competitor and the competition heretofore existing between them has been destroyed; (3) the ability of smaller manufacturers to compete with the combined Koppers-Thomas Company has been substantially lessened; (4) Koppers' already dominant position in the industry has been enhanced; and (5) the total effect of the merger will "certainly" tend to lessen competition in the flexible coupling industry (J.S. 39–40).

Subsequent to the rendition of the district court's opinion on January 9, 1962, the government submitted a proposed order requiring Koppers to divest itself of the assets of Thomas within six months. Appellants filed objections to the proposed order and

a hearing was held on January 24, 1962. At that time the court heard argument on the proposed order and ruled that Koppers must divest itself of all the stock and assets of Thomas, as a unit and as a going flexible coupling business, within nine months from the date of the order (J.S. 64-65).

ARGUMENT

The main issue in the present case is whether the acquisition of Thomas, the fourth largest producer of flexible couplings, by Koppers, the largest producer of flexible couplings, violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. In holding that it did, the district court found that: (1) flexible couplings had "sufficient peculiar characteristics and uses" to constitute a line of commerce within the meaning of Section 7 of the Clayton Act (J.S. 22); (2) the appropriate "section of the country" was, as the parties had stipulated, the entire United States (J.S. 24); and (3) the effect of the acquisition "is to substantially lessen competition in the sale of flexible couplings throughout the United States" (J.S. 39), by eliminating "Thomas * * * as a substantial competitor [of Koppers]" and by enhancing "Koppers' already dominant position in the industry" (*ibid.*).

While the jurisdictional statement sets forth five "Questions Presented," appellants later recite that "[e]ssentially this case raises two important problems * * * [*viz.*,] * * * the line of commerce appropriate to a case like the present * * * [and] * * * the right of a defendant in a civil antitrust action to

a hearing and to introduce evidence on the question of the remedy" (J.S. 9). We shall show that neither aspect of the court's holding raises an "important problem."

1. *Line of Commerce.* The district court, following the rule laid down by this Court in *United States* v. *duPont & Co.*, 353 U.S. 586, 593–594, properly held that "flexible couplings have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other products as to make them a line of commerce within the meaning of the Clayton Act" (J.S. 22). Its finding is clearly correct. Thus, the court noted that while "[a]ll flexible couplings are not identical * * *, [t]here is no disagreement whatsoever by any of the witnesses as to the function and purpose of the flexible coupling" (*ibid.*). The court specifically found that though using different principles to achieve flexibility, the "various types of flexible couplings * * * [serve] the function of connecting rotating shafts, transmitting power from the driving to the driven member and while so doing compensating for minor degrees of misalignment" (Fdg. 7, J.S. 42). The court noted also that the testimony "by the witnesses in the industry shows that the gear, disc, rubber, jaw and chain type flexible couplings are all regarded as products of a general classification, that is flexible couplings" (J.S. 23), and that in the Engineers' Digest, "the whole field of flexible couplings is encompassed in an article * * * entitled 'Flexible Couplings'" (*ibid.*).

While appellants do not in terms assail this finding of "line of commerce" as "clearly erroneous,"[2] in essence their jurisdictional statement presents that issue. Thus, they point to a survey by the Vice President of Thomas, which indicated that "only 8.19 per cent of the total sales made by Thomas in 1960, were in possible competition with the Koppers gear type couplings" (J.S. 6), and ask this Court to decide whether, in light of this survey, Thomas and Koppers could be in the same line of commerce (J.S. 10).

The short answer to appellants' question is that the court in effect rejected the survey[3] when it found that there was substantial competition between Koppers and Thomas, stating (J.S. 32–33):

> As to the competition between the couplings, this court believes that the evidence in this

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[2] In their questions presented appellants have challenged both the court's findings on line of commerce (J.S. 3–4), and the court's failure to use their sales survey in determining the line of commerce (J.S. 4), but appellants have argued only the latter point as ground for review by this Court.

[3] The "survey" was made in the following fashion by the vice president of Thomas: he decided that certain types of couplings were "non-competitive to Fast [Koppers]" (Tr. 206) and that his sales records readily showed that such couplings accounted for 61.9% of Thomas 1960 dollar sales (Tr. 213); to determine what portion of the remaining 38.1% of Thomas sales were non-competitive, a sample consisting of 1,000 orders out of a total of 12,827 orders was examined (Tr. 213–215).

It was brought out on cross-examination that the vice president of Thomas, who conducted the "survey," had no previous experience in sampling methods, was not familiar with sampling techniques used by experts (Tr. 238); and that, contrary to accepted sampling techniques, the sample was made by selecting 1,000 consecutive sales orders, rather than by random samples over the entire year (Tr. 252–54).

> case is practically conclusive that it is only in the sizes under 1¼" in diameter and in areas where no lubrication is required that the [Koppers] and Thomas couplings do not compete. But the evidence shows that the bulk of Thomas sales is in the other sizes where competition exists. Also, it is shown that there is practically no installation of a gear type coupling where a Thomas coupling will not do the job. * * *

The evidence on which the court relied included documents from Koppers' own files, referring to the competitive activity of Thomas (Fdgs. 14–27, J.S. 44–47), as well as a letter written by G. C. Werner, Vice-President of Thomas, shortly before its acquisition by Koppers, in which he stated to a customer: "We cannot recall a single government agency or large commercial agency which has refused to accept gear type and Thomas couplings as basically equal" (J.S. 36). It was Werner who conducted the post-acquisition survey upon the basis of which appellants now seek to upset the trial court's findings.[4]

In any event, since the district court found that flexible couplings were a line of commerce, it did not have to consider whether there were or could be narrower categories within flexible couplings which might themselves be a line of commerce. As was stated in *Crown Zellerbach Corp.* v. *Federal Trade*

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[4] Appellants' contention that the court erred in treating the Werner survey too narrowly (J.S. 4) is not supported in the record. The court's opinion (J.S. 33) discusses that survey in connection with the purpose for which it is now pressed: the extent to which there was substantial competition between Koppers and Thomas (see the heading at J.S. 28).

Commission, 296 F.2d 800, 812 (C.A. 9), pending on petition for certiorari, No. 890, this Term: "In the statutory phrase 'in any line of commerce', the word entitled to emphasis is 'any'. *Any* line of commerce does not mean the same as the entire line of commerce, or all lines of commerce engaged in or touched upon by the acquired concern." See also *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 595 (S.D.N.Y.).

Further, whatever the amount of competition found to have existed between Koppers and Thomas, other findings by the district court show that the acquisition here violated Section 7. The court expressly found that "the ability of smaller manufacturers to compete * * * has been substantially lessened" (*ibid.*); that "Koppers' already dominant position in the industry has been enhanced by obtaining Thomas customer lists which competitors do not have" (*ibid.*); that "the entire engineering and manufacturing services of the Koppers organization is now available in the industry for not only the Fast coupling [manufactured by Koppers] but to promote the Thomas coupling as well." (*id.* at 40); and that "[s]uch a result inevitably will squeeze the smaller manufacturers" (*ibid.*). From these findings, which appellants do not question, the court concluded that "[t]he total effect of the merger will certainly tend to lessen competition in the coupling industry" (*ibid.*). These subsidiary and ultimate findings as to the impact of the merger upon the remaining competitors lie outside what appellants set forth as the substantial questions raised. Standing alone, they

would fully support the judgment below (see *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D.N.Y.); H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8).

2. *The Remedy.* Appellants contend that the district court erred in ordering divestiture without affording them an opportunity to present alternate remedies and in holding that the only remedy permitted by law was complete divestiture (J.S. 4). There is no merit to either contention.

In *United States* v. *duPont & Co.*, 366 U.S. 316, 328, 331, this Court expressly stated that "complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7 * * * [Divestiture] should always be in the forefront of a court's mind when a violation of § 7 has been found." This position has been reaffirmed recently in *California* v. *Federal Power Commission*, No. 187, this Term, decided April 30, 1962, in which the Court said (slip opinion, pp. 6–7, fn. 4):

> * * * As to the remedy we stated in *United States* v. *duPont & Co.*, 366 U.S., at 334: "We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."

Following delivery of the court's opinion, appellants were afforded fifteen days in which to present materials concerning "the appropriate relief to be

granted" (J.S. 58). Appellants filed objections to the government's proposed decree (J.S. 59) and a memorandum of law supporting those objections (J.S. 60-63). Alternative remedies to divestiture could have been presented by appellants at that time, but were not. Instead, appellants argued that divestiture was "unduly harsh" and that alternative [redacted] remedies existed (J.S. 59), and they asked for an additional thirty days to describe them. After giving appellants an opportunity to present oral arguments, the court modified the proposed decree to take account of several of their objections, recited that it could "see" no alternative remedy, and, rejecting appellants' request for an additional thirty days to propose alternative remedies, ordered divestiture.

Such action was not an abuse of the court's discretion, and presents no substantial question for this Court's review. In light of this Court's statements in *duPont* that "complete divestiture is peculiarly appropriate" (366 U.S. at 328); that "courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests" (*id.* at 326); and that "all doubts as to the remedy are to be resolved in [the government's] favor" (*id.* at 334), it was clearly proper for the trial court to direct divestiture and to reject appellants' request for additional time to present undisclosed "alternative remedies."

[redacted]

[1] In response to appellants' objections, the court extended the time for divestiture from six to nine months (J.S. 59-60, 64) and permitted the sale of both stock and assets of Thomas (J.S. 59, 64).

Appellants' claim that the district court "erroneously concluded that it had no alternative to ordering divestiture" (J.S. 10) is similarly without substance. The court maintained an open mind towards all possible remedies. In its opinion (J.S. 58) the court stated that "Further hearings, if necessary, will be conducted * * * to determine the appropriate relief to be granted." In fact, as noted, a hearing was held and appellants were afforded an opportunity to present whatever materials they desired with respect to the decree. However, although they filed objections to the remedy proposed by the government (J.S. 59–60) and a memorandum in support of those objections (J.S. 60–63), they failed at any time to offer the court any meaningful description of what alternative remedies they might wish to propose (J.S. 62).

It is in light of these facts that the court's statement during oral argument on the proposed decree—"* * * I welcome—I want to hear your argument, but let me say this, though, I don't see any other remedy. I can't see any other remedy. I think the law compels [divestiture] * * *" (J.S. 67–68)—must be understood. The court was not then ruling, as appellants contend, that the only remedy permitted by law was complete divestiture. It was only advising appellants of its view that in light of the findings of fact in the case, the proof adduced by the government, the Supreme Court's statements in *duPont* that divestiture is the "natural remedy" for violations of Section 7 of the Clayton Act (366 U.S.

at 329), and in the absence of concrete alternatives proposed by appellants, divestiture appeared to be the appropriate remedy.

CONCLUSION

The decision below is correct, and this appeal presents no questions warranting further briefs and oral argument. The judgment of the district court should be affirmed.

Respectfully submitted.

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JUNE 1962.

In *duPont*, this Court rejected the government's argument that courts must order divestiture whenever they find a violation of Section 7 of the Clayton Act (366 U.S. at 328, n. 9). The court below was well aware of this express ruling, since it was cited in appellants' post-trial memorandum (J.S. 60), and again on oral argument immediately before the court's statement quoted above (J.S. 67).